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This Article evaluates several alternatives to the current system of resolving professional liability disputes: (1) New compensation and liability systems, both mandatory and elective; (2) the sharing of responsibility for professional error; and (3) various informal types of claim resolution. The complex conceptual and practical problems that would have to be solved before mandatory strict liability or no-fault compensation systems could be established are first discussed. There follows an exploration of the advantages that might be obtained more effectively through elective no-fault coverage made available to professionals and clients, and a sketch of some of the less radical ways in which the sharing of responsibility for error by professionals and clients could produce desirable effects. Finally, the Article details the benefits of pretrial screening and voluntary binding arbitration, and compares the benefits with the potential costs of these informal approaches.

Consideration of reform has been prompted by several dissatisfactions with the current system of handling professional liability disputes. The professions themselves face periodic crises in the availability and high cost of liability insurance. These crises are the product of uncertainty about a future portended by recent changes in the law governing the right to compensation for professional error, an increasing number of claims, and a rise in the average severity of claims. Another cluster of concerns is related to the legal standard by which professionals are judged and its application in the courts. Critics of the present system cite as weaknesses the expense of trial by jury,[1] the unrealism of

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1. *See, e.g.*, PENNSYLVANIA SOCIETY OF ARCHITECTS, ANALYSIS OF PROFESSIONAL LIABILITY INSURANCE ISSUES IN PENNSYLVANIA 8 (1975) (costs of defense); CALIFORNIA CITI-

evaluating a professional's conduct in such a context, and the unpredictability of jury decisions. Finally, society has come to find uncompensated injury less and less tolerable.[2] This gradual change in social philosophy draws attention to the fact that the law awards compensation only to some of those who suffer injury or loss caused by professional services and denies compensation to others. Because thinking about reforms designed to remedy these dissatisfactions is still at an early stage, this Article will discuss not only the potential advantages of reform, but also the difficulties that will have to be overcome if reform is to be successful.

Two separate issues should be kept in mind. The first concerns factual questions: What are the causes of recent developments, and what will be the effect of proposed changes? Without answers to these questions, it will be difficult to focus on the features of the current system, if any, that are proper candidates for reform. The second and separate issue concerns matters of principle: Once the facts are known (or predicted), on what basis shall they be evaluated? A "defect" for one individual or group may be an "advantage" for another.

I. New Compensation and Liability Systems

A. *Mandatory Approaches*

Tort reform in such fields as products liability, worker's compensation, and no-fault automobile insurance has been achieved in part by manipulating three elements to achieve desired goals.[3] The first element is the *compensable event*—the behavior, condition, or occurrence triggering a right to compensation. The second is the *payment mechanism*—the means by which the entitled party is actually compensated. The third is the *measure of compensation* awarded the claimant. Each

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zens' Comm'n on Tort Reform, Righting the Liability Balance 94-104 (1977) (tort system generally); Report of the Special Advisory Panel on Medical Malpractice, State of New York 164 (1976) [hereinafter cited as Advisory Panel Report] (medical malpractice cases).

2. Perhaps the best illustration of the application of this philosophy to the law of torts can be found in the work of Fleming James, Jr. *See* F. Harper & F. James, The Law of Torts (1956).

3. For analysis of the law in each of these fields, see L. Frumer & M. Friedman, Products Liability (1980); A. Larson, Workmen's Compensation for Occupational Injuries and Death (1972); J. O'Connell & R. Henderson, Tort Law No-Fault and Beyond (1975).

change has altered the way traditional negligence law treated one or more of these elements.

Although it developed somewhat differently, professional liability law is now a close relative of traditional negligence law.[4] The compensable event in professional liability is an injury or economic loss to a client (or a limited set of third parties) caused by the professional's malpractice—his failure to exercise the care or skill expected of a practitioner in his field.The payment mechanism is usually third-party liability insurance—a contract by which an insurance company agrees with the professional to pay judgments against the latter up to a specified maximum. The measure of compensation is full tort damages—all of the claimant's out-of-pocket expenses plus those general damages necessary to make him whole.

Alterations in each category could produce various changes in the professional liability system. The compensable event could be modified to replace the malpractice standard with a more liberal right to compensation. This would permit recovery by more people, potentially with greater speed and less expense than is currently possible. Such a new system could impose strict liability on the professional for the expanded set of compensable events. Alternatively, it could render the professional immune from liability and require clients to purchase no-fault insurance against loss. The measure of compensation could also be altered, limiting recovery to something less than full tort damages in order to finance a liberalized right to compensation.

To mandate such changes at this stage, however, would be premature. It is not at all clear that a liberalized right to recovery is needed in order to compensate those whom it is desirable to compensate, including some who may not currently be entitled to compensation. Imposing strict liability on professionals would render them liable for many losses that they could not avoid and could not appropriately be said to have caused. Substitution of client-purchased no-fault insurance for tort liability might simplify the claims process, but it would relieve professionals of financial responsibility for their errors at a time when the public calls for more, not less, responsibility from professionals. A reduction in the measure of compensation could finance payment to more persons. But even if the class of recipients

4. For some detail of this history, see Hawkins, *Retaining Traditional Tort Liability In The Nonmedical Professions*, 1981 B.Y.U. L. REV. 33.

could be properly defined, its members would be compensated at the cost of denying full compensation to those now entitled to recover all their losses. These are serious problems that require detailed examination. Although systematic reform would undoubtedly involve a combination of such changes, it may be useful to focus separately on the compensable event, the payment mechanism, and the measure of compensation in order to isolate the implications of the available alternatives in each category.

1. The compensable event

At least one of two goals would underlie any liberalization of the compensable event: (1) The desire to facilitate recovery by those entitled to it even under current legal standards, and (2) the need to compensate other persons who are not entitled to recovery under current standards. Many of the phenomena that led to the adoption of the three major no-fault systems—strict products liability, worker's compensation, and automobile no-fault—do not now affect nonmedical professional liability.[5] But two other factors that are not fully understood might well argue for liberalization of the compensable event in this field.

First, there may be a significant number of persons entitled to recovery who never file a claim because the claim's small size prevents them from obtaining an attorney willing to take the case. There is, for instance, a widespread belief that many victims of medical malpractice encounter this difficulty.[6] If there is a large group whose claims against nonmedical professionals are similarly foreclosed, a no-fault system might be in order. Secondly, there may also be a large number of persons who suffer losses caused by professional services, but who are not entitled to compensation because their losses are not caused by malprac-

5. Professor Hawkins has indicated that a number of the factors which preceded the adoption of worker's compensation and automobile personal injury no-fault statutes are absent from the context with which this Article is concerned: the difficulty of characterizing split second driving decisions in terms of moral fault; the overloading of the judicial system with many small claims; the overpayment of the small claims and the underpayment of the large; and a series of particularly harsh tort doctrines that impeded recovery by the employee. *See id.* at 47-50.

6. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 100 (1973) [hereinafter cited as SECRETARY'S COMMISSION REPORT]; ADVISORY PANEL REPORT, *supra* note 1, at 161. *See also* Havighurst & Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 1974 INS. L.J. 69, 73 (suggesting that many potential claimants fail even to recognize that negligence was involved in the injuring activity).

tice. A properly designed no-fault system could extend compensation to these individuals. Empirical research into the extent to which the provision of professional services is affected by either of these problems should therefore have a high priority.

One factor that certainly weighs in favor of the no-fault approach is the inefficiency of the current system. The lengthy and individualized scrutiny of a professional's performance as undertaken at present is very expensive. Estimates vary, but it appears that between fifty-five and eighty percent of the premium dollar may be allocated to legal and administrative expenses.[7] Only the remaining twenty to forty-five percent actually compensates malpractice victims. A no-fault system capable of avoiding this inefficiency could have much to recommend it. However, designing a no-fault system poses a problem that proves toublesome in both principle and practice: how to define the compensable event. There are two possible devices—a general definition or a set of specific ones.

a. *A general definition of a compensable event.* Worker's compensation and automobile no-fault define the compensable event in general terms: injuries "arising out of" or "in the course of" employment or driving.[8] These standards ensure against the imperfect result—the perfect result being injury-free employment or driving. Providing such a guarantee in these fields has been feasible because it is relatively easy, both in principle and in practice, to interpret the definition in which the guarantee is embodied. The definition incorporates a decision of principle—that all injuries occurring in and related to the activity should be compensable. And as a practical matter, when an injury does occur in a setting of employment or driving, it is only the unusual case in which it does not "arise out of" these activities.

It is not at all clear, however, that a no-fault system of pro-

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7. For estimates of that portion of the premium dollar which is actually paid to patients, see CALIFORNIA CITIZENS' COMM'N ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 116 (1976); PHYSICIANS CRISIS COMM. [OF DETROIT], COURT DOCKET SURVEY 2 (1975); O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 506-09 (1976); Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141, 1155 (1975); SUBCOMMITTEE ON EXECUTIVE REORGANIZATION OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 91ST CONG., 1ST SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 10 (1969).

8. *See* 1 A. LARSON, *supra* note 3, at § 6.00; UNIFORM MOTOR VEHICLE REPARATIONS ACT § 2.

fessional liability should have such blanket coverage. Consider the different kinds of losses that might be compensable under such a system. Certain less-than-perfect results are due to a client's desire for something to which he is not entitled or which is impossible to achieve. In this category would fall such "losses" as an architect's inability to produce a design that the client finds both satisfactory and within financial limitations. It is difficult to see any reason for mandating compensation in such cases. Although such results are less than satisfactory from the client's point of view, they are not "losses," as the term is generally understood in other no-fault fields. Rather, they are examples of a failure to obtain something that was never really available. The proper antidote to such disappointments is full disclosure of risks at the outset of the professional-client relationship. On the other hand, certain unsatisfactory results are in theory avoidable (even though not caused by malpractice) and can properly be termed "losses." These might include an accountant's failure to discover a form of corporate fraud specifically designed to fool an accountant (and not discoverable by following accepted professional procedures) or an attorney's reasonable judgment not to call a particular witness at a trial when, with hindsight, the testimony of the witness would have been helpful to his client's case.

Determining which of such losses ought to be compensable is a considerable theoretical task. The factors that legal theorists have suggested be considered in allocating losses on a no-fault basis vary widely.[9] Unless the decision were made that all losses, even those only remotely related to professional services, were to be compensable, a general no-fault definition (*e.g.*, "losses arising out of the provision of professional services") would be unacceptably vague.[10] Such a definition would leave undetermined which less-than-perfect results would be compensable. After much adjudication the meaning of such a definition might become clear, but the confusion that now surrounds the analogous problem of defining the defective product in products liability

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9. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

10. For analysis of the weakness of such a definition as applied to medical malpratice, see Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 523-24 (1977); Epstein, *Medical Malpractice: Its Cause and Care*, in THE ECONOMICS OF MEDICAL MALPRACTICE 245, 260 (S. Rottenberg ed. 1978).

law suggests that case-by-case application of a general definition is not the most promising way to proceed.[11]

b. *Specified compensable events.* Having encountered difficulty in developing a workable general definition of compensability, the framers of proposals for no-fault compensation of medical adversities turned in another direction: specification of the conditions constituting compensable events.[12] This approach might also be useful in the nonmedical field. By determining in advance which events would be compensable, designers of the system would make the calculations necessary to determine what losses arise out of professional services.

Various factors could be taken into account in constructing the list of compensable events, including (1) the cost of the system (by assessing the frequency of an event's occurrence and the ease of distinguishing it from non-compensable events), (2) the relative avoidability of an event[13] (if it is a stict liability rather than a first-party no-fault system), and (3) the fairness of imposing liability for a particular kind of loss on professionals or requiring clients to insure against its occurrence.[14]

Although specifying compensable events might avoid some of the conceptual difficulties of case-by-case application of a general compensation standard, other problems would remain. First, without systematic knowledge of the nature and incidence of the adverse results of nonmedical professional services, any effort to construct a workable set of compensable events would have to be made in ignorance of several factors such as the cost of the system, the impact of requiring insurance against certain outcomes but not others, and the equity between those compensated on a no-fault basis and those left to recourse, if any, within the tort system.[15] Filling these gaps in information with empiri-

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11. For the range of problems generated, see D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY: CASES AND MATERIALS 6-34, 359-524 (1976).

12. *See* Havighurst & Tancredi, note 6 *supra.*

13. By including events that are relatively avoidable, the system could disregard the question whether in each particular case the event was in fact caused by professional services. For discussion of this causation problem, see Epstein, *supra* note 10, at 264; Havighurst, *"Medical Adversity Insurance"—Has Its Time Come?*, 1975 DUKE L.J. 1233, 1254-55; Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 614-15 (1973).

14. *See* Havighurst & Tancredi, *supra* note 6, at 76-82.

15. If the range of specified compensable events were great, tort liability for all non-specified events might be abolished. If the system were to begin more tentatively by specifying a limited number of events, tort liability could be abolished for these events but retained in connection with any other losses. *See* Havighurst & Tancredi, *supra* note

cal research and expert analysis within each profession would aid the design of the system and provide some evidence of its feasibility.

A second concern would arise if a third-party payment mechanism were adopted. Professor Guido Calabresi has termed this the substitutability problem—an excessive professional incentive to avoid producing a compensable event by unjustifiably following a procedure less effective than another because it is less likely to produce the event. To avoid encouraging this defensive practice, unacceptable outcomes of the less effective procedures would also have to be compensable. It probably would be impossible to catalogue in advance all second-choice procedures for every compensable event. But ironically, determining case-by-case whether such a procedure was chosen could closely resemble deciding whether malpractice has occurred. The magnitude of the substitutability problem would depend on the range of events actually covered by the system. And the net cost of the problem could be determined only after comparing the substitutability problem under the new system with the costs of defensive practice under the current one.[16]

A final issue to be faced in structuring a system of specified compensable events is complexity. As protections against the potential difficulties discussed above are fashioned, the system will become complex, generating litigation over borderline questions of compensability and thereby incurring a portion of the cost, inconvenience, and perceived injustice that the system itself is designed to avoid. Whether it would be possible to construct a sufficiently simple but reasonably comprehensive set of compensable events must be determined by further study in each of the professions.

2. *The payment mechanism*

A financial incentive to avoid producing compensable events could be created most effectively by requiring professionals to pay compensation out of their own pockets. This is true whether the compensable events are limited to losses caused by malpractice, or consist of a greater range of losses not necessarily related

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6, at 74.

16. Although there are a number of studies about the affects of defensive medicine, *see, e.g.*, Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939, similar studies of the nonmedical professions have not appeared.

to fault. Of course, the need to deter malpractice is not strong enough to require that professionals pay compensation themselves. They are allowed to purchase insurance against liability because a large judgment could impose a severe burden on them, their families, and their careers. Insurance shifts this loss into wide channels of distribution. Furthermore, insurance not only protects the professional, but also assures the successful claimant of compensation. The permissibility of insurance against liability for malpractice reveals the law's ambivalence about the whole question of professional fault. Malpractice is faulty behavior, but not so faulty as to call for the punishment that uninsured liability would constitute. This attitude would argue even more strongly for permitting insurance if professionals were also obligated to pay compensation for events unrelated to malpractice.

If the cost of liability insurance is linked in some way to the professional's liability experience, the financial incentive to perform carefully exists even when the professional is insured against liability. Rate classification in the liability insurance offered most of the professions, however, has been either very gross or nonexistent. The number of both claims and insured parties is too small to support sophisticated statistical distinctions among them.[17] A strict liability system, on the other hand, might produce enough additional claims to warrant a more detailed risk and rate classification. When it is not feasible to classify risks in detail, sizeable deductions or coinsurance can link liability experience and insurance cost. Some of the nonmedical professions are now encountering these devices as the cost of full coverage rises. Even without such devices, potential liability probably tends to affect professional behavior through other means, such as the time a professional must spend in defending a claim and the fear of the publicity connected with a lawsuit.

On the other hand, many professionals would question whether reliance on potential liability alone promotes proper professional performance. Other factors, unaffected by tort liability, such as professional pride in the quality of services provided, the business advantages of providing high quality services, growing peer group review, and continuing education and recertification requirements might promote quality performance

17. For discussion of these difficulties in pricing medical malpractice liability insurance, see ADVISORY PANEL REPORT, *supra* note 1, at 224.

even if tort liability were abolished. The effect of potential liability on professional behavior needs to be studied in much greater detail in order to evaluate this contention.

Obviously, the smaller the role potential liability plays in affecting professional performance, the less difference there will be between a third-party strict liability approach and the wholesale substitution of first-party no-fault insurance for tort liability. In neither case will the payment mechanism seriously affect professional behavior; in both, the price of insurance will be reflected in the total cost to the client of obtaining professional services. Thus, it might make sense to consider abolishing the tort liability of professionals.

The abolition of tort liability would of course eliminate the making of claims against professionals. If a loss caused by malpractice continued to be the compensable event, however, professionals would still have to be involved in the claims process and many of the current burdens and embarrassements would remain. On the other hand, if the problems entailed in defining a broader set of compensable events were solved, the professional's obligations could be limited to verifying the occurrence of compensable events. Clients could then recover compensation from their own insurance companies more simply and efficiently than from the professional's insurer under a malpractice or strict liability system. The savings expected from this approach (together with the elimination of general damages in a large group of claims) were a major incentive for the adoption of no-fault automobile accident compensation systems.

However, one factor that made mandatory first-party insurance feasible for automobile accidents is not present in the professional liability context. It was relatively easy to enforce the requirement that motorists purchase first-party insurance. Motorists already were covered by readily convertible third-party liability insurance and there was an existing enforcement apparatus. In contrast, there is neither a readily convertible form of insurance already covering clients of professionals nor an existing administrative system for enforcing the purchase of such insurance.[18] Hence, implementing mandatory first-party insurance could prove to be very cumbersome.

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18. *See* J. O'CONNELL, ENDING INSULT TO INJURY 70-71 (1975); Hawkins, *supra* note 4, at 49.

3. The measure of compensation

Having determined what occurrences would trigger a right to compensation and how to finance it, the framers of a new system would next have to decide on the measure of compensation. The most important consideration here is how much the range of compensable events has been broadened, for there are strong arguments against the payment of full tort damages when the right to recovery is liberalized. Any no-fault system worth operating will not only broaden the range of compensable events, but will also expand the number of persons entitled to compensation. If full tort damages are payable for each compensable event, the system may become extremely expensive to operate. Admittedly, this expense would appear greater than it really is because the increase in costs would partly represent a shift of existing expenses from individuals suffering losses to all those paying premiums to finance the new system. Nevertheless, it is unlikely that there would be enough political support to enact any mandatory system in which premiums significantly exceed those currently paid for professional liability insurance. It is also unlikely that any savings gained from eliminating the need to prove malpractice in jury trials would be sufficient to prevent premiums from exceeding current rates if full compensation were afforded to all those suffering losses unrelated to fault.

The costs of the system could be minimized either by limiting the range of compensable events or by paying less than full tort damages. Both worker's compensation and no-fault automobile insurance found ready categories of damages to eliminate in order to help finance payment to more people: general damages for pain and suffering. Claims against nonmedical professionals, however, are seldom for personal injury. Rather, the typical claim is for economic loss alone. In the absence of a conveniently dispensable category of damages, it might be feasible to pay only a specified percentage of claimants' full tort damages. Although this approach would require a seemingly arbitrary limitation on compensation, payment of a percentage of losses may not seem so arbitrary when compared with the realities of payment under the current system.[19]

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19. Currently, if a claim is settled before trial, the settlement figure is a product of compromise based on the strength of the claim as well as other subjective factors. If the case goes to trial, it may be lost. If plaintiff wins a verdict, it may not necessarily be for the amount of "objective" loss actually suffered. And after judgment is paid, plaintiff

In sum, the development of no-fault theory in the field of professional liability is at a preliminary stage. It remains unknown whether nonmedical professional services cause losses which ought to be compensated but which do not find redress within the current system. Although the inefficiency and inconvenience of litigating malpractice claims may argue for reform, much work must be done before a no-fault system of any sort would be successful. The difficulty of designing a system that would facilitate recovery and reduce litigation without introducing new problems (and the accompanying cost of resolving them) cannot be overlooked. Until developments that promote quality professional services—even in the absence of tort liability—reach maturity, it is unlikely that the public would tolerate the abolition of professional liability which would be part of a first-party insurance approach.

Perhaps most important, there is reason to wonder whether clients, who will ultimately pay a large part of the cost of any system, would want mandatory protection against losses due to nonnegligent professional services, given what that protection could cost. The right to recover for malpractice, together with the opportunity to choose and to change one's own attorney, architect, engineer, or accountant may more effectively combine the twin goals of providing necessary compensation and encouraging the exercise of skill and care than any of the complicated no-fault approaches. For clients and professionals who are interested in combining these goals in a different way, the development of elective alternatives has more potential for flexibility and fine tuning than a uniform mandatory plan.

B. Elective Approaches

One peril of any mandatory reform is that it would impose on all professionals and clients a uniform set of rights and obligations, not tailored to meet the varying needs of the individuals concerned. A different approach would allow the professional and client to fashion the terms of their relationship concerning liability and compensation. Elective no-fault, for example, has been championed by Professor Jeffrey O'Connell as an alternative to tort liability for losses caused by products and services.[20]

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usually receives only a specified percentage; the remainder pays counsel fees and expenses.

20. *See* J. O'CONNELL, note 18 *supra*. It should be noted that in referring to profes-

An elective system for professional services could be either completely or partially elective.

1. Completely elective systems

A completely elective system would leave to the contracting parties—professional and client—authority to specify compensable events, the payment mechanism, the measure of compensation, and whether tort liability for unspecified events would be retained or waived. Where the parties specified payment through first-party insurance, the agreement would concern only the nature and extent of the client's waiver of tort rights. The remaining items could be the subject of any insurance policy purchased separately by the client. The fees charged by the professional could vary, depending on the extent of tort liability waived by the client and the extent of no-fault or other liability, if any, assumed by the professional.

The completely elective approach has several dangers. Permitting the professional and client to structure their own compensation-liability relationship circumvents some of the vexing issues that would face those designing a uniform plan. However, it does not resolve these issues; it merely transfers them to the professional and client. The myriad of available variations would make it extraordinarily difficult for either party to make an informed choice about the advantages and disadvantages of all the alternatives or about the proper price for insurance coverage.[21] Consequently, form contracts would probably be drawn up by the insurance industry after consultation with the professions concerned.

The professions would undoubtedly have an interest in including within any list of compensable events those occurrences most frequently subject to tort liability (*e.g.*, an attorney's failure to file within the applicable period of limitations prescribed by statute), while excluding others. If these contracts also reduced the measure of compensation, the result would limit the professional's exposure, while providing little concomitant benefit to the client. Moreover, any attempt by an attorney to induce

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sional services, Professor O'Connell speaks almost exclusively of the health care professions.

21. More than the pricing of the no-fault coverage is involved. Because some partial tort waivers will occur, reductions in malpractice liability insurance premiums should accompany them.

a client to waive existing rights would probably be unethical.[22] Because insurance contracts would be an integral part of even the completely elective approach, state insurance commissioners would be involved at some stage to represent the interests of the public. Whether this would assure fairness of coverage is uncertain.

2. Partially elective systems

Partially elective systems would permit the parties to modify their liability relationship by contract, but would specify one or more terms to be included in the contract between professional and client should they elect that approach. If enabling legislation specified a list of compensable events, then all the burdens of constructing it would be placed on those drafting the legislation. But such specification could protect against the danger that the events would have the professional orientation described earlier.

Setting mandatory minimum levels of compensation could introduce a similar protection. However, the absence of a readily expendable category of tort damages would be as much of a problem here as it would be for the planners of a mandatory plan. For the design professions, payment of only economic losses in that minority of cases involving personal injuries might be adequate. In cases of economic loss, a mandatory minimum percentage of what would otherwise be the client's full tort damages, as described earlier, might be prescribed for all nonpersonal injury claims. The percentage set would not be so arbitrary as in a mandatory plan, because it would not be a limit—it would only be a minimum that could be adjusted between the parties according to their risk preferences and discounted in setting the fees for services.

The last element of a partially elective system that might be fixed by enabling legislation concerns the relation of any new compensation arrangement to traditional tort liability. Legislation could require or permit waivers of tort rights by the client in consideration of the professional's assumption of certain compensation obligations. The nature of the other elements fixed by the statute would determine the appropriate treatment of tort liability. For example, the greater the range of compensable events and levels of compensation (whether prescribed by the

22. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-104, 6-102 (A) (1970).

statute or adopted by agreement of the parties), the stronger the justification for making complete waiver of tort liability a prerequisite to the client's participation in the system. Thus, a system with specified compensable events of moderate scope and reduced compensation might require waiver of tort liability for losses resulting from the occurrences specified as compensable events, but could retain traditional tort liability for other losses. On the other hand, a more extensive system with a wider range of compensable events and higher minimum compensation might require complete waiver of tort liability as a prerequisite to participation.

A different variation could mix tort and no-fault liability within individual claims. Professionals could be allowed to provide no-fault compensation for damages below a specified dollar amount, *e.g.*, $10,000, in return for the client's waiver of tort liability in the amount for any claim actually brought.[23] Such a mix could provide a simplified and possibly less costly procedure for processing small claims. Although professionals would be voluntarily assuming added liability by agreeing to such a mix, savings from the simplified claim procedure and elimination of the admission of malpractice that some professionals believe is implicit in settling a claim might be an adequate *quid pro quo* for this added obligation. A great deal more information about the configuration of current claims and the nature of adverse results in the various fields will have to be obtained before precise projections can be made about the effects of these alternatives.

Finally, any elective system, whether completely or only partially optional, would have to deal with a problem resembling that of informed consent. Protections would have to be built into the system to ensure that both parties understand the terms of their waivers of legal rights and to guard against imposing an elective liability agreement on the client as a condition of the professional's accepting employment. Without safeguards, the system's effectiveness could be undermined by the selective invalidation of the agreements in courts of law.[24]

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23. *See* J. O'CONNELL, *supra* note 18, at 104-05. Such coverage would resemble the "add-on" coverage now available in certain states that have not adopted mandatory no-fault automobile insurance. *See, e.g.*, MD. ANN. CODE art. 48A, §§ 538-547 (Supp. 1979).

24. For a discussion of these issues, see O'Connell, *supra* note 7, at 529-37.

II. Toward Shared Responsibility

Behind concern over individual doctrines in the law of torts, premium rates, and proposals for basic changes in the way professional liability is handled, lies an uneasy feeling among many professionals about the entire field of professional responsibility. Some—perhaps even most—of the changes we are witnessing in standards of professional ethics, continuing education, public involvement in control of the professions, and malpractice liability are positive. Yet each development signals a decrease in the traditional autonomy of the individual practitioner within his profession and of the professions in society. The increasing public regulation and scrutiny of professionals suggest consideration of the sharing of responsibility for the results of professional activity. Peter Brown has noted how increasing the professional's understanding of the novelties of the client's problems might justify such a sharing.[25]

Another phase of such shared responsibility could involve the initiation of joint professional-client determination of their respective responsibilities for losses caused by the professional's activities on behalf of the client. Elective no-fault is such an approach, but it may be too much, too soon. Instead of beginning by allowing modification of the compensable event—the most difficult aspect of reform—the first step toward reform could experiment by permitting modification of the measure of compensation or the payment mechanism. Mandatory changes in these elements have in the past been acceptable only in return for expanding the events for which compensation is available. But as the relationship between professional and client becomes less paternalistic, changes made at the option of these parties may seem more acceptable.

For example, one major cause of recent premium increases is growth in the average amount of damages paid in a successful claim. These increases might be tempered by negotiated ceilings on the damages recoverable by a client in the event of a malpractice claim.[26] The present standard of care and method of

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25. *See* P. Brown, Professional Finitude and Informed Consent: Limiting The Liability of Non-Medical Professionals (unpublished paper presented at the Symposium on Professional Responsibility in Denver, Colorado on July 14, 1977, and on file with the Brigham Young University Law Review).

26. Professor Richard A. Epstein has proposed a similar approach to medical malpractice claims. *See* Epstein, *Medical Malpractice: The Case for Contract,* 1976 A.B.F. Res. J. 87, 130-31. Because of attorneys' unique duties to their clients, special problems

payment could remain the same; the client could be permitted to purchase first-party umbrella coverage for above-ceiling losses. Eventually the professional's liability insurance premiums might be reduced in proportion to the number and amount of limitations agreed upon with his clients. The amount of the fees charged by the professional could also be linked to the amount of any recovery limitation agreed upon.

Many professionals would be reluctant to propose a limitation on their liability for error at the very outset of their employment. In addition, many advocates of consumer rights would object to the very possibility of such a limitation. Raising this question in the context of fee discussions, however, might not necessarily be disruptive of the professional-client relationship or harmful to the client's interests as a consumer. The discussion could acquaint the client not only with the risk of error, but also with the general advantages and disadvantages of particular approaches to his problem. The greater the client's understanding of and participation in the choice of the risks involved in the services requested, the stronger the justification for sharing these risks. The danger that a professional's superior knowledge concerning the potential for loss could result in an unconscionably low ceiling might be reduced by prescribing a minimum ceiling that no agreement could diminish. Another method would be to limit the system initially to agreements between professionals and sizeable business clients and public organizations, perhaps as measured by gross annual income or number of employees. The danger that these institutions would be deceived or mislead by the professional is slight.

It might also be charged that a negotiated ceiling approach could decrease professional incentive to exercise skill when providing services. Of course, the extent to which the current system's gross (or nonexistent) third-party insurance rate classification encourages care is uncertain; whether there would be a serious reduction merely from placing a ceiling on damages is also questionable. But the problem could be addressed by requiring that any negotiated ceiling on liability be linked to a prohibition on the professional's right to insure against liability for a portion of the claim. This practice is already being used in

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would arise in applying this approach to legal services. But even here the authorization of public advertising by attorneys may open up the market sufficiently to render bargaining between attorneys and clients acceptable. *See* Bates v. State Bar, 433 U.S. 350 (1977).

the professions whose liability policies include a deductible or exclude the costs of defense from coverage. Higher deductibles or coinsurance by the professional (*e.g.*, for twenty percent of each claim) could be required whenever a ceiling is placed on liability. Professionals would then have a greater financial incentive to avoid malpractice and would more closely share responsibility for error with their clients.

Because of the possibility of a reduction in fees in return for limited liability, clients might become more aware of the now-hidden cost of professional liability and could join with the professional in determining the proper mix of protections against loss. The client's knowledge that the professional would have to pay a portion of any claim might tend to discourage some of the uncertain number of frivolous actions that are now brought because of the availability of third-party payments.

Another device that might be used to achieve similar results would function like a deductible or coinsurance provision between professional and client. The two parties might agree, for example, that the professional would be liable for only fifty percent of any judgment entered against him, or that he would not be liable for the first $3,000 of any such judgment. In return, the client could be offered a variable fee schedule, depending on the compensation arrangement that is adopted.

Use of negotiated ceilings or professional-client coinsurance would not revolutionize professional liability. Many clients and professionals would not avail themselves of the protection. Moreover, the danger that the bargaining process would not be free and open is a serious one and would require careful controls. But the proposals might provide a choice not effectively available now, and they could do so with minimal government intrusion and without the troubles inherent in the more complex alternatives described earlier. Experience with this limited elective approach could serve as a model for the continued design of more complex alternatives and as an experiment in sharing professional-client responsibility.

III. Informal Claim Resolution

Nonmedical professional liability claims are now subject to adjudication in courts of law. Resolving claims via this formal process is relatively expensive in both time and money. Preparation for trial requires more time than might be necessary if the decisionmakers already knew the law and were familiar with the

patterns of professional conduct in question. The complexity of the facts and issues presented sometimes demands painstaking elaboration before a jury of lay people. Although a large percentage of claims are ultimately settled prior to or during trial, the last step in the process conditions everything that goes before it.

The perception that the judicial process is unjust is widespread among both claimants and professionals. From the professional's point of view, the jury's awareness of the existence of liability insurance may create a prejudice in favor of the claimant. In addition, the process permits adverse publicity and a long period of exposure and discomfort. From the claimant's point of view, the process is full of formalities which prevent describing a claim without artificiality, which delay final resolution, and which promote compromise of legitimate grievances.

All but the most hardened advocates of trial by jury would agree that these criticisms are accurate to some degree. In evaluating the alternatives, it must be considered (1) whether each can achieve its goals—to offer a less expensive, more accurate, or less uncomfortable procedure than formal adjudication, and (2) what disadvantages would accompany the realization of these goals. Because proposals for informalizing nonmedical liability disputes are only beginning to surface, systematic arguments on their behalf have not emerged.[27] Detailed analogues are available, however, in recent efforts at medical malpractice reform.[28]

For purposes of analysis, the descriptions that follow are "pure" types. Some of the characteristics of each informal forum—the professional board of review, mandatory screening, and binding arbitration—could be varied in order to transform the forum into a hybrid resembling more than one of these alternatives. The more significant variations are noted in the analysis.

A. Professional Boards of Review

Some of the dissatisfactions with formal adjudication can be reduced by settling claims prior to trial. One way to encourage

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27. For two such proposals, see PENNSYLVANIA SOCIETY OF ARCHITECTS, *supra* note 1, at 12 (binding arbitration); AMERICAN INSTITUTE OF ARCHITECTS LIABILITY REVIEW TASK FORCE, FINAL REPORT TO THE BOARD OF DIRECTORS 4(1976) (factfinding, mediation, and advisory arbitration).

28. *See* Baird, Munsterman & Stevens, *Alternatives To Litigation, I: Technical Analysis*, in SECRETARY'S COMMISSION REPORT, *supra* note 6, app. at 214; Note, *Medical Malpractice Arbitration: A Comparative Analysis*, 62 VA. L. REV. 1285 (1976).

settlement is to permit the parties to obtain an impartial assessment of the claim's merits at an early stage in the dispute. Over the years, various medical societies (sometimes with the cooperation of bar associations) have created boards of review to provide such assessments of medical malpractice claims. Typically the board is composed of physicians who hear the defendant's description of the incident prompting the claim and advise him whether the claim is defensible. In some programs an attorney also sits on the board; in still others, the claimant is allowed to participate if he promises to abandon the case if the board finds that the required standard of care was followed.[29] The board may agree in return to provide the claimant with expert testimony in a subsequent trial if it finds that the claim has merit. Participation in the proceedings is voluntary and the board's decision is not admissible into evidence at trial.

The board of review is designed to provide a preliminary estimate of the merits of a claim. As such, it is most likely to be successful in encouraging abandonment of clearly frivolous claims and settlement of clearly meritorious ones. The most optimistic estimates (based on a limited number of claims) are that between fourteen and twenty-nine percent of the medical malpractice claims reviewed under such a procedure advance no further.[30] Some of these, of course, would have been abandoned or settled even without the board's review. Provided the cost of conducting the proceeding is reasonable (a few hours of everyone's time) and participation remains voluntary, experimentation with similar forums for review of nonmedical professional claims might be worthwhile.

The paradox of boards of review, however, is that although they are designed to provide an alternative to trial by jury, their success is likely to hinge on their capacity to preview what would occur at trial. Juries, however, have been notably unpredictable in the area of professional liability. The decision of a board composed only of a defendant's professional colleagues, or even of a larger number of persons hearing only the defendant's side of the case, is not in any event likely to be perceived as a reliable index of a lay jury's future reaction. Because boards of review traditionally have not made findings concerning damages, even a decision for the claimant may not produce a settlement if

29. *See* Baird, Munsterman & Stevens, *supra* note 28, at 224-25.
30. *Id.* at 270.

the damages issue is disputed. In short, the majority of claims would probably proceed beyond the review stage, having encountered an additional layer of procedure and some extra cost along the way.

B. Mandatory Screening

A second cluster of informal practices may be termed "nonbinding arbitration" or "pretrial screening". In contrast to the professional board of review, screening panel review (as it will be called) is mandatory, and generally only one member of the panel is a professional colleague of the defendant. Although review is mandatory, it is nonbinding in that either party is entitled to trial in a court of law if dissatisfied with the panel's decision. Screening panel review of medical malpractice claims has been mandated by statute in approximately half the states.[31]

Applied to nonmedical professional liability claims, such a system might work as follows. Every claim would be submitted to a review panel composed of a member of the defendant's profession, an attorney and a lay person.[32] The panel would hear presentations by both sides and could dispense with the rules of evidence when desirable. It would render a decision concerning liability and appropriate damages. Either party would have a right to reject the panel decision and to require a trial de novo in a court of law. The decision of the panel might or might not be admissible in evidence at trial.

The screening panel idea is superficially appealing. Because

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31. *See* ALASKA STAT. § 09.55.536 (Supp. 1980); ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1980); ARK. STAT. ANN. § 34-2602 (Supp. 1979); DEL. CODE ANN. tit. 18, §§ 6803-6814 (Supp. 1980); FLA. STAT. ANN. § 768.44 (West Supp. 1981); HAWAII REV. STAT. §§ 671-11 to -20 (1976); IDAHO CODE §§ 6-1001 to -1013 (1979); ILL. ANN. STAT. ch. 10, §§ 201-214 (SMITH-HURD SUPP. 1980-81); IND. CODE ANN. § 16-9.5-9 (Burns Supp. 1980); KAN. STAT. ANN. §§ 65-4901 to -4908 (Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1981); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A01 TO -2A09 (1980); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1981); MO. ANN. STAT. §§ 538.010-.080 (Vernon Supp. 1981); NEB. REV. STAT. §§ 44-2840 to -2847 (1978); NEV. REV. STAT. § 41A.020 -.090 (1979); N.H. REV. STAT. ANN. §§ 519-A:1-5 (1974); N.M. STAT. ANN. §§ 41-5-14 to -28 (1978); N.Y. JUD. LAW § 148-a (McKinney Supp. 1980-81); OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1980); PA. STAT. ANN. tit. 40, §§ 1301.301-.606 (Purdon Supp. 1980-81); R.I. GEN. LAWS § 10-19-1 to -10 (Supp. 1980); TENN. CODE ANN. §§ 23-3401 to -3421 (Supp. 1979); VA. CODE §§ 8.01-581.1 to .12:1 (1977); WIS. STAT. ANN. §§ 655.02-.21 (West 1980).

32. In order to avoid having two attorneys on the board in an attorney malpractice case, two lay people could serve. The attorney would then function as both professional expert and legal advisor.

of the panel's professional and legal expertise, the cost of preparing and presenting the case might be kept low. This expertise could also promote accuracy in the panel's decisions. The presence of a layperson could serve to keep the panel honest by importing the public conscience into the proceeding. Claims could be heard speedily, informally, privately, and with as little hostility between the parties as possible. Yet the right to a full-scale trial in the event of dissatisfaction with the result would be preserved. Lastly, the availability of pretrial screening might allow the hearing of valid claims that are currently foreclosed because of their low potential recovery.

Closer analysis discloses a number of reasons to wonder whether optimism about mandatory screening is justified. First, panel members will surely be more aware of the existence and character of professional liability insurance than the average jury. Whether the panel would be better able to ignore this awareness than supposedly plaintiff-oriented juries is uncertain. Second, overall cost savings are uncertain. Although the technical and legal expertise of the panel could facilitate presentation and decision, the lay person would still have to be educated about the claim. Also, the attraction of valid small claims, though obviously a beneficial development, would probably be accompanied by at least some additional claims without merit. This cost would have to be considered in any prospective accounting. Third, and perhaps most important, mandatory screening will suffer from the same flaw encountered by the professional review board; to the extent that a litigant's attorney believes a more favorable result might be achieved before a jury, settlement will be discouraged, because the losing party will have an incentive to reject the panel decision and to elect a trial de novo.

Rejection of the panel decision by the disappointed party can be discouraged in a number of ways. The costs of conducting the hearing (including panel members' fees) could be assessed, along with attorneys' fees against the party rejecting the decision if that party also loses at trial; or the panel decision could be made admissible in evidence in a subsequent trial. Because the panel decision will carry considerable weight with the jury, the unsuccessful party would be discouraged from attempting to challenge that decision. But these disincentives run a risk of violating state constitutional prohibitions against infringing the

right to trial by jury.[33]

Even though putting teeth in the panel decision is constitutional, doing so will inevitably add to the cost of the proceeding. If costs and counsel fees are at stake and the panel decision is admissible at a later trial, serious preparation—perhaps resembling preparation for an actual trial—will have to occur because a favorable panel decision is critical to ultimate success. It would be manifestly unfair, therefore, to provide for admissibility of the panel decision without allowing substantial discovery prior to the panel hearing. Whether at this point the cost and character of the proceeding would begin to resemble that of a jury trial—the very phenomenon it seeks to avoid—is yet another open question.

There are, of course, possible benefits apart from cost savings, to be derived from mandatory screening. One is the potential for a relatively small pool of panelists to develop sufficient expertise and familiarity with claims to produce some uniformity in its decisions. The smaller the pools from which panelists are chosen, the greater the probability that panelists will sit on more than a few claims each year. Few observers would see the development of a very small group of decisionmakers as wholly desireable, but at least some familiarity with the procedure on the part of panel members would be beneficial. Even if results do not differ substantially from what would occur at trial, the privacy and informality of the proceeding may help the parties feel more satisfied that the issues received a fair hearing.

These nonfinancial advantages of screening will vary, depending on the nature of the claim and the professional services involved. The medical profession has perhaps the strongest argument for informal claim resolution. Health is always a personal matter; physician-patient relations are most likely to be adversely affected by the potential of a lawsuit tried in open court. In contrast, the nonmedical professions as a group probably have less claim to the need for an informal setting in which to resolve disputes. Although many of their relationships are

33. *See* Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). *But see* the following cases upholding the constitutionality of screening panel legislation: Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

personal, many are also business or commercial relations not depending heavily on personal factors.

Distinctions can be drawn not only among the professions, but also between the nature of the claim and the identity of the claimant. The attorney who drafts form letters for a collection agency has less need for an informal claim resolution procedure in order to preserve continuing relationships with his clientele than does the architect who works with the handicapped in designing housing to suit their needs. These individual differences in the character of relationships and the nature of services suggest that the value of a pretrial procedure will depend very much on the disputes it services.

In short, mandatory screening will not be able to do all things for all cases. Limiting its goals, however, might increase the chances of success. For example, the patently unmeritorious claims that are not abandoned until the parties reach the courthouse steps or that result in a directed verdict for the professional might be more speedily abandoned after a brief and inexpensive proceeding the decision of which would be inadmissible at a later trial. How many such claims are made is unknown. On the other hand, a procedure with comparatively full discovery, the right to call witnesses, and the opportunity for cross-examination might also promote settlement of the more complex cases. The cost of resolution would be somewhat reduced in the portion of these cases settled after the panel hearing and without trial. Yet a portion will not be settled and will proceed to trial. Because of the additional cost of the mandatory panel hearing, the total cost of resolving these claims will have been substantially increased.

Whether any of these procedures would produce a net saving is uncertain. This and other questions posed in this discussion are especially susceptible to empirical research. Two dozen state variations employing this basic scheme now process medical malpractice claims. A systematic study of their cost, their effect on litigant satisfaction, and their impact on the configuration of claims could provide the architects of this approach to nonmedical claims with a great deal of guidance.

C. Binding Arbitration

The foremost danger of adopting mandatory screening is that the procedure will be ineffective in screening cases. That danger is avoided by binding arbitration. A new trial in a court

of law is not permitted following binding arbitration, because the decision of the arbitration board is final. Compulsory arbitration of all professional liability claims would probably violate most state constitutions. Statutory authorization of voluntary binding arbitration, however, is undoubtedly constitutional. Several states have enacted statutes regulating arbitration of health care liability claims,[34] and a majority of states have enacted variations of the Uniform Arbitration Act, pursuant to which voluntary binding arbitration of professional liability claims is almost certainly valid.[35]

Many of the arguments for mandatory screening can also be made in favor of arbitration. For example, the expertise of the board might produce more satisfactory decisions; hearings could be prepared for and conducted less expensively than a trial by jury; a semblance of uniform treatment might result if the arbitration board sat often enough; a board could be speedily convened after a claim is made; and the privacy and informality of the hearing might be more conducive to both parties' satisfaction. But unlike mandatory screening, arbitration would rarely add a layer of costs to the process. The grounds for appeal would be strictly limited—they would be appeals on questions of law, not trials de novo.[36]

The similarities between binding arbitration and pretrial screening should not obscure this important difference—the function of screening is to encourage the settlement of claims; arbitration, though it may have conciliatory overtones, is a final adjudication. Counsel and the parties will surely react accordingly. The parties will invest all resources justified by the claim. Therefore, only if the nature of the forum itself demands fewer resources will savings occur.[37] And because the arbitration hear-

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34. *See* ALA. CODE § 6-5-485 (1975); ALASKA STAT. § 09.55.535 (Supp. 1980); CAL. CIV. PROC. CODE § 1295 (West Supp. 1980); ILL. ANN. STAT. ch. 10, §§ 201-214 (Smith-Hurd Supp. 1980-81); LA. REV. STAT. ANN.. §§ 9:4230 -:4236 (West Supp. 1981); MICH. COMP. LAWS ANN. § 600.5040 (Supp. 1980-81); N.D. CENT. CODE §§ 32-29.1-01 to -10 (Supp. 1979); OHIO REV. CODE ANN. §§ 2711.01, 2711.21-24 (Page Supp. 1979); S.D. COMP. LAWS ANN. §§ 21-25B-1 to -26 (1979); VT. STAT. ANN. tit. 12, §§ 7001-7008 (Supp. 1980); VA. CODE. § 8.01-581.12 (1977).

35. For an analysis of the application of these statutes to medical malpractice claims, see Wadlington, *Alternatives To Litigation, IV: The Law of Arbitration in the U.S.*, in SECRETARY'S COMMISSION REPORT, *supra* note 6, app. at 346.

36. Arbitration legislation typically allows a decision to be overturned only on very limited grounds. *See* UNIFORM ARBITRATION ACT §§ 12, 13, 19.

37. For a comparative statistical analysis of defense costs in medical malpractice arbitration and trial by jury, see Heintz, *Arbitration of Medical Malpractice Claims: Is*

ing is a final adjudication, the relative amicability that might manifest itself in screening panel hearings is less likely to occur in arbitration. In short, the finality of arbitration has distinct advantages, but this aspect of the approach may also produce fewer of the benefits of informality than might otherwise be expected.

A system of arbitration could be (and to a limited extent has been) initiated by one or more professions in most jurisdictions under the auspices of the applicable general arbitration statute. Professionals, in cooperation with their insurance carriers, could produce form arbitration agreements, which could be offered to clients when the professional is retained. The option to arbitrate could also be offered to claimants (either clients or third parties) at the inception of a claim. But agreements produced in this fashion run the risk of being invalidated as unconscionable, because general arbitration statutes provide few of the protections necessary to make arbitration of professional liability claims fair and effective.[38]

The process by which the parties reach agreement to arbitrate and the terms of that agreement are important features of any arbitration system. In the professional liability context, the parties may be unequal in bargaining power or have unequal access to pertinent information about the advantages and disadvantages of the alternatives. Statutes expressly authorizing and regulating arbitration of professional liability claims could clarify and structure the process to ensure that it is equitable.

A number of issues should be addressed by any enabling statute. First, although making arbitration compulsory for both parties is prohibited, a requirement that the professional offer the client the arbitration option may be valid.[39] Such a requirement would make arbitration compulsory for the professional if it is elected by the client. Even if valid, however, this approach will have transformed the nature of the procedure—it will no longer be a voluntary effort by both parties to settle their dispute without recourse to the courts. Nevertheless, it must be

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it Cost Effective?, 36 MD. L. REV. 533, 549-51 (1977).

38. For a discussion of these issues as they arise in the context of arbitration of medical malpractice claims, see Henderson, *Alternatives to Litigation III: Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, in SECRETARY'S COMMISSION REPORT, *supra* note 6, app. at 321.

39. Recent Michigan legislation provides that all contracts insuring hospitals against liability shall require the hospital to offer patients the option of executing agreements to arbitrate claims. *See* MICH. COMP. LAWS ANN. § 500.3053(1) (Supp. 1980-81).

recognized that clients will generally be unaware of the availability of the process and that professionals will be reluctant to discuss the possibility of error at the very time they are being employed. Without the requirement, substantially fewer claims will be made subject to arbitration and resolved out of court.

Second, an enabling statute should regulate the circumstances under which the offer to enter into an arbitration agreement may be made and under what conditions, if any, such an agreement may be revoked.[40] By providing an option to revoke an arbitration agreement within a specified period following the completion of the professional's services, a client's interests can be protected and the validity of most agreements assured without the excessive prescription of offering conditions.

Third, the statute should specify the composition of the board and hearing procedures. With such matters settled, the actual process of agreement would be simplified. In addition, eliminating such variation might encourage uniformity and predictability of decisions.

Fourth, the board's obligation to apply the appropriate standard of care and the scope of judicial review should be clearly specified. General arbitration statutes customarily do not allow an appeal for failure of the board to decide in accord with existing law. Unless the board has an express obligation to do so, its powers will be unclear and the availability of appeal uncertain. If appeal for error of law is desirable, then the board should be required to set forth findings of fact and conclusions of law as part of its decision. Otherwise, the courts will be unable to determine the basis of a board's decision and there will be no formal constraint on a board's power to alter the applicable standard of care. Of course, the board could be allowed to determine the standard to be applied without regard for existing law. But such authority could result in even more variance in decisions that exists at present.[41]

Lastly, an enabling statute should include such relatively mechanical but important matters as (1) definitions of the professionals and the kinds of services covered, (2) allocation of responsibility for payment of costs, (3) method of board selection, and (4) the effect of a decision on the defendant's right to con-

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40. *See* MICH. COMP. LAWS ANN. § 600.5042(3) (Supp. 1980-81), providing patients who sign arbitration agreements the right to revoke within 60 days of discharge.

41. For an analysis of the possible effects of such authority on the variability of decisions in medical malpractice arbitration, see Abraham, *supra* note 10, at 519-20.

tribution from joint tortfeasors where fewer than all possible defendants to a claim are obligated to arbitrate.

In contrast to formal adjudication in which the decisionmakers are the claimant's peers, each of the procedures discussed in this section relies heavily on professional decision. Making a procedure mandatory may therefore raise serious criticism because many other complicated tort claims will remain within the court system. On the other hand, there may be an inherent bias in any version of an informal procedure that is optional. If a procedure turns out to be generally favorable to a profession, its members will undoubtedly offer their clients the option of agreeing to it. If a procedure seems to favor clients, it probably will not be offered. Because, inevitably, more clients than professionals will be uninformed about the advantages and disadvantages of a particular option, professionals may possess a strategic advantage whenever procedures are made optional.[42]

The informality and privacy of the procedures may be valuable, but too much should not be expected of them in this regard. The professional in each case will have been accused of committing malpractice. Professional pride will produce hostility whether or not the accusation and hearing are public. In addition, aspects of increased privacy and the elimination of formality may exacerbate existing problems. Results and trends at the informal level will be less accessible to those wishing to make predictions or adjust their behavior in reliance on them. This low visibility could reduce the deterrent effect of potential liability or encourage defensive practice because of uncertainty about the standards to which members of a profession are actually being held. Finally, it should be kept in mind that the justice achievable by relaxing rules of evidence and limiting (both formally amd practically) judicial review has two faces. Decisions can be fine-tuned to the realities of the dispute, but they can also be shielded from the equitable adjustment that appellate review would otherwise allow.

IV. Conclusion

The problems related to nonmedical professional liability have no magic solution. No single reform can deal with all complaints about the current system. Moreover, it must be realized that many of the possible changes for the better will require pro-

42. *See* Note, *supra* note 28, at 1295.

fessionals or clients to surrender something in return. This is not a prescription that the status quo be retained, but it is a caution that only by careful planning and realistic appraisal of the trade-offs entailed in any new approach can successful reform be achieved.